IN ARBITRATION PROCEEDINGS PURSUANT TO
AGREEMENT BETWEEN THE PARTIES

In the Matter between	
STATE OF CALIFORNIA, DEPT. OF CORRECTIONS (SIERRA CONSERVATION CENTER), Employer	DPA No. 99-12-0060
and	ARBITRATOR'S OPINION AND AWARD
INTL. UNION OPERATING ENGINEERS, LOCAL 39, Employee Organization	January 24, 2002
Involving issues related to health and safety	

APPEARANCES:

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BEFORE:

Bonnie G. Bogue
Arbitrator

Arbitrator's Case No. 66402-G3a

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PROCEDURAL BACKGROUND

This arbitration arises pursuant to the agreement between the STATE OF CALIFORNIA, DEPARTMENT OF CORRECTIONS (hereinafter the State or Department) and the INTL. UNION OPERATING ENGINEERS, LOCAL 39 (hereinafter the Union), under which BONNIE G. BOGUE was selected as Arbitrator and under which this award is final and binding on the parties. The grievance involves the Department of Corrections prison facility at Sierra Conservation Center and Bargaining Unit 12.

An evidentiary hearing, wherein the parties availed themselves of the opportunity to call witnesses and present evidence and argument, was held at Sierra Conservation Center near Jamestown, California, on December 18, 2001. Witnesses were duly sworn. A verbatim record of the hearing was prepared, and a transcript was made available. The record was closed on on December 18, 2001, oral arguments having been made on the record, in lieu of written briefs. The matter was submitted for decision on January 11, 2002, the date upon which the Arbitrator received the reporter's transcript. The parties stipulated that the matter was properly before the Arbitrator, time-lines having been met or waived.

STATEMENT OF THE ISSUE

The parties stipulated at the hearing to the following statement of the issue to be determined:

> Did the Department of Corrections violate Sec. 14.11 of the MOU when it required Bargaining Unit 12 employees to traverse Tuolumne Yard to arrive at and depart from their work locations? If so, what is the appropriate remedy?

CONTRACT PROVISIONS

The terms of the Unit 12 collective bargaining agreement which the parties have cited in support of their respective positions are as follows.

14.11 Health and Safety Grievances

A. When an employee or IUOE in good faith believes that the employee is being required to work where a clear and present danger exists, the supervisor will be so notified. The supervisor will immediately investigate the situation (unless circumstances do not permit, the supervisor will endeavor to check with a higher level of management or with a departmental safety officer) and either direct the employee to temporarily perform some other task or proclaim the situation safe and direct the employee to proceed with assigned duties. If IUOE or the employee still believes the unsafe conditions exist, IUOE or the employee may file a formal grievance. For health and safety grievances, the employer will respond with 10 days at level 1 and within 5 days at level 1.

B. If the grievance is not resolved at the department level of appeal, IUOE shall have the right to submit the grievance to binding arbitration in accordance with the provisions articulated above.

SUMMARY STATEMENT OF FACTS

Following is a summary of the facts of the case. When appropriate to a particular issue, a more detailed finding of facts is included in the Discussion, below.[1]

This case involves a correctional facility in the California Department of Corrections, known as Sierra Conservation Center. The grounds of the facility include administrative offices, inmate housing units, a dining hall, and buildings in which the inmates are occupied during the

[1] Citations to the reporter's transcript are given when noting specific testimony or resolving conflicts in testimony. Testimony on general background or undisputed testimony is not referenced. Transcript references are to page (RT 152), or page and line (RT 152:9). A number of transcription errors are apparent in the transcript; however, in no instance was an error such that the true meaning of the testimony was not clear to the Arbitrator, and presumably to the parties also present at the hearing.

day in vocational education activities or in prison industry work. (JX 2 is a map of the grounds and was used throughout the hearing to illustrate locations.) The buildings surround a large, central yard, called Tuolumne Yard. Unit 12 employees who are directly affected by this grievance are employed in the Prison Industry Authority building (known as PIA) where they direct the work of inmates in the manufacture of clothing.

To get to their place of work each morning, Unit 12 and other employees (known as free staff) are currently required to traverse the central yard after they enter into the fenced grounds through the main security gate near the opposite end of the compound. A timed video tape showed it took less than 10 minutes for these employees to reach the prison industry building after they entered through the main security gate. At the time they traverse the yard each morning, inmates are also traversing the yard, either going from their housing units to the "chow" hall for breakfast, returning from the dining hall to their residence, or awaiting their daily duty assignment. Some congregate near the prison industry and vocational education buildings for a few minutes after breakfast and until the buildings are opened and ready for them to enter for their day's work. The yard is also used for recreational activities of inmates during the day. Correctional officers are both walking on the yard and standing in observation towers placed around the periphery of the yard whenever these employees are crossing the yard. Free staff carry whistles or personal alarms at all times.

The present grievance was filed when the route that Unit 12 employees traveled to get from the parking area to the PIA building was changed in 1998. Prior to the change, since 1992, the employees walked outside the fence (where no inmates were allowed) on a service road and only came inside the fence at a smaller pedestrian gate when they neared the prison industry building; they did not have to traverse the yard.

That route was cut off when the Sierra Conservation Center administration erected a temporary fence which blocked the service road in 1998. The purpose and justification for the fence are the subject of testimony and documentary evidence (discussed below). After the fence went up, the employees had to enter the yard at the far end of the grounds at the security gate entrance, thus requiring that they traverse the length of the yard to get to their place of work in the prison industry building at the far end of the yard. They likewise traverse the yard in the afternoon at the end of their work shift, when inmates may be on the yard participating in organized recreational activity, such as baseball.

POSITION OF THE EMPLOYEE ORGANIZATION

The position of the Union is summarized as follows. A more detailed statement of its arguments is included in the Discussion, below.

Requiring employees to traverse the yard, when as many as 700 inmates are present, creates a clear and present danger to their health and safety, in violation of Sec. 14.11 of the MOU.

While employees in a prison setting are necessarily in contact with inmates, it creates a clear and present danger to unnecessarily and significantly increase the number of inmates they have contact with on a daily basis. It is not necessary to wait until someone gets killed or injured to find that this unjustified increase in inmate contact constitutes a clear and present danger for bargaining unit members. One employee testified to being harassed by an inmate, upset by a disciplinary write-up, who walked closely behind her while she walked across the yard. Another employee was seriously injured by a flying baseball bat when she walked through the yard.

To eliminate this unnecessary danger, Sec. 14.11 requires that Unit 12 employees be allowed to use the old way of reaching their work site or an alternative route devised to avoid the requirement that they traverse the yard to go to and from their work site.

Rather than responding in good faith to the grievance in an effort to find a way of eliminating the added danger, management responding with shifting justifications since the grievance was filed. The Union had information showing that the fence was "illegal" in that it was not authorized and created a safety risk by barring emergency vehicle access, as well as subjecting employees to danger as they cross the yard. The Union was prepared to show in the arbitration that management was acting unreasonably by refusing to remove an unauthorized fence which was placing Unit 12 employees in danger. Management did not disclose to the Union prior to the arbitration hearing documents which it now claims justify the fence as correcting a security problem. Had management provided that information in good faith and in a timely manner, the Union could have responded and worked with management to resolve the employees' safety concerns. Instead, management belatedly had the document generated immediately prior to the arbitration hearing in an obvious effort to beat the Union in the arbitration.

POSITION OF THE EMPLOYER

The position of the Employer is briefly stated as follows. A more detailed statement of its arguments appears in the Discussion, below.

There is no evidence to support the Union's claim that the increase in inmate contact required by the change of route has created a clear and present danger to employees' health and safety. Working in a prison is inherently dangerous; the change in route has not increased

the danger to which these employees are regularly exposed so as to create a “clear and present” danger that would violate the MOU.

The old route may have been quicker and more convenient for employees, but the new route does not create a clear and present danger. Unit 12 employees work around inmates in large numbers on a daily basis and with less security than is available to them in the brief period of time when they walk cross the yard. They work with as many as 100 inmates at a time in the prison industry building with no correctional officers present, and in even more hazardous circumstances because inmates working in the prison industry or vocational education facilities have available to them tools and other items that could potentially serve as weapons.

There is adequate security on the yard, heightened when more inmates are traversing the field. Employees carry whistles or alarms; correctional officers are on the grounds; armed guards are in the towers. There is no evidence that any employee has ever been threatened or harassed while walking across the yard since the route was changed in 1998, with one minor exception when no actual threat was involved and the inmate was one whom that employee dealt with every day in the workshop without the presence of a correctional officer. The only employee injury by an inmate on the yard was plainly an accident, not an intentional assault.

Shortly before the arbitration, the Union began referring to this case in correspondence as the “illegal fence” grievance, whereas prior to that time the focus of the grievance was on the safety issue caused by the increased contact with inmates. When the Union attempted to change the focus of the grievance to whether the temporary fence was “illegal,” the administration reasonably obtained clarification about the approval for the fence and presented that evidence in defense to the Union’s claims. While handling the grievance, the Union made no request for information about the justification for the fence, so there is no basis for the

Union's argument that the Department had tried to prevent the Union from knowing about the status of the approval of the fence.

The evidence shows that temporary fence was erected in response to a security audit and to block an area that was vulnerable to inmate escape. The fence also prevents visitors from coming into an area where contraband could be tossed to inmates. Despite a delay in departmental approval, the present "temporary" fence has now been approved for permanent replacement when funding is available. Therefore, the fence is a security measure and the resulting re-routing of employees' access to their work site is reasonable and not in violation of the MOU.

DISCUSSION

The contractual standard in Sec. 14.11 of the MOU requires the Department to correct any situation in which a Unit 12 employee is required to "work where a clear and present danger exists," or to investigate and "proclaim the situation safe and direct the employee to proceed with assigned duties."

In this instance, the Sierra Conservation Center (SCC) administration proclaimed the situation (requiring employees to traverse the yard rather than using the outside service road to reach their work site) was safe when it rejected the employees' complaints about the new route. The Union then exercised the contractual right to submit that determination to binding arbitration. The question before the Arbitrator is whether management was correct in determining that the new route Unit 12 employees must follow to get to their work site is "safe" or whether the change of route caused by the new fence has created a "clear and present danger" justifying an order that the Department provide an alternative route that does not require Unit 12 employees to traverse the yard.

The parties have presented no precedent for prior interpretations of the contractual standard, nor evidence of any past practice of determining what may constitute a "clear and present" danger under Sec. 14.11 of the MOU.

The Union's position is that merely requiring employees to be in the yard, when several hundred inmates are present,[2] creates an obvious "clear and present danger" because it significantly increases the opportunity for potentially hostile inmates to attack employees or for employees to be in harms way when altercations between inmates occur. It argues that this increase in the level of danger inherent in prison employment is not justified because the fence itself was unreasonably erected by local SCC administration, without departmental approval.

The Union is correct in its argument that the contract cannot reasonably be read to require that there be actual injury or death for the "clear and present danger" standard to be violated. Nonetheless, any increase in the potential for danger or risk of harm to which Unit 12 employees are regularly exposed does not automatically create a "clear and present danger." Rather, the nature of the increased risk must be evaluated to determine if the contractual standard has been violated. Evidence was presented to illustrate the conditions that exist when employees cross the yard, what the safety risks are, and what safety protections are being employed to avoid possible injury.

The evidence in the record does not support the Union's claim that the increased inmate contact necessitated by the changed route has created a "clear and present danger," for the following reasons.

[2] Estimated by a Union witness as ranging from 60-200 inmates in the morning, and 300-500 in the afternoon. (RT 25:19; 32:24). Estimated by a Department witness at no more than 200 inmates on the yard in the morning. (RT 114:25) Inmates enter the yard to go to the chow hall in "controlled" releases from residence halls to limit the number actually on the yard at any given time.

The amount of time Unit 12 employees are walking across the yard is brief, less than 10 minutes each way.[3] Also, the time they traverse the yard is limited to a specific, pre-scheduled time in the morning and again in the afternoon, prior to and at the end of their regular work shifts. More than one employee is walking across the yard during the same time periods. Correctional officers' presence on the yard is increased at these time periods because of the increased number of inmates on the yard at the same time, since the inmates are being released from their residences to go to the "chow hall", or are waiting to begin work in the PIA and voc ed buildings, or in the afternoon are engaged in supervised activities on the field. Because the employees are present at scheduled times at the beginning and end of the work shifts, officers in the towers are alerted to the fact that free staff are walking to and from their work sites during those periods.(See RT 29, 59-61, 67 etc.)

In addition to the protection offered by correctional officers patrolling the yard and staffing the towers (see RT 135-36), free staff carry whistles and personal alarms and receive training in how to respond to a threat of danger (see RT 140-41). The testimonial evidence about established safety procedures shows that response to any alarm sounded by free staff would be prompt and all-out. (RT 69, 141-43)

The relative danger to which employees are exposed while on the yard does not constitute a significant increase in threat of harm inherent in their jobs, when viewed in comparison to the overall level of danger to which these same employees are regularly and customarily exposed throughout their work day. The evidence shows that only two Unit 12

[3] As was demonstrated by a video tape played at the hearing to illustrate for the Arbitrator, with explanatory testimony of a witness, the path the employees take, the number of inmates present and where they are while employees traverse the yard, the location of correctional officers on the ground and in towers, etc. Employees were walking across the yard between approximately 6:56 to 7:05 a.m. (See RT 115-134)

employees work in the PIA building all day with no regular presence of a correctional officer, themselves supervising about 100 inmates (RT 31). The inmates working there have access to tools and other items that could be used to attack an employee or another inmate.

Union witnesses also voiced concern that a greater potential for violence exists in the yard because of the gangs or "factions" among prisoners and the potential for fights to erupt in the yard, and that employees may be in harms way simply by being present.[4] (RT 57-58)

If the security measures that are in place to protect against the danger these employees are exposed to in their regular working area are sufficient, when they are out of sight of any correctional officer and greatly outnumbered by inmates, then those measures are also sufficient to provide a reasonable level of security against inmate attack while these employees cross the yard in the view of the towers and in the presence of correctional officers on the yard.

There is also no evidence that the potential risk of harm caused by this increased inmate contact has materialized into any significant threats to health or safety of employees. The new route has been in effect for approximately three years, between the time the temporary fence blocked the prior access in 1998 and the date of the arbitration hearing in December 2001. The lack of any actual harm, or even serious threat of harm, during that time lends credence to the Department's contention that the level of security is sufficient to dissuade any disgruntled inmates from using this opportunity to harass or threaten free staff.

The Union presented evidence of two incidents to underscore its position that there is a heightened safety risk that could, and in one instance did, result in actual injury.

[4] Union 2 consists of reports documenting fights among inmates. No evidence was presented to show that any employees were assaulted or harmed by such altercations. (RT 80: 11-16) A Department witness testified that incidents of violence are typically between inmates, and that in his experience no free staff has been threatened, or has ever sounded a personal alarm. (RT 143-44)

One free staff (a supervisor in the prison industry unit) testified to feeling threatened when two inmates closely followed her and a co-worker as they crossed the yard. They had "written up" one of these inmates for misconduct earlier that day while in the PIA building. However, the incident did not prompt her or the co-worker to blow their whistles or call for a correctional officer; rather, the co-worker merely turned to look at the inmate and that was sufficient to prompt him to move away. The witness reported no repeat problem with that inmate nor any similar occurrences, although disciplinary write-ups of inmates by free staff is not uncommon. (RT 103 et seq.) No other employee testified to any threatening words or gestures.

The other incident was an accident, when an apparently very enthusiastic inmate baseball player flung his bat and struck a vocational education employee on the leg when she was walking at a considerable distance from the ball game. (RT 89, et seq.) She sustained a significant injury (SX 1) There was no finding that the inmate was attempting to hit anyone with the bat. Even though employee proximity to organized sports by the inmates does create some risk of injury, a fluke accident such as that is not sufficient to support the claim that their mere presence on the yard creates a "clear and present danger" because employees might get in the way of such athletic activity.

Finally, to determine whether even a relatively minor increase in risk to employee safety might create a "clear and present danger," it is appropriate to consider whether the Department's action that created that increased risk was reasonable. A change in working conditions that does increase employees' safety risk, but which is not justified by any operational necessity, may be deemed to violate the contractual standard because it creates an unreasonable and unwarranted increase in the risk to employee safety.

The Union relied on that concept when it questioned the SCC administration's authority to erect the temporary fence which blocks the employees' former route on the service road. It has contended that the fence was unauthorized and therefore did not justify the added safety risk to employees required to traverse the yard after the fence was constructed. The Department procured a document, just before the arbitration hearing, which states that a permanent fence is now authorized, to replace the temporary one that has been there since 1998. The Union has questioned the good faith, or even the legitimacy, of the Department's belated production of this document, particularly since the Union previously had documentary evidence that the fence was not authorized (causing it to dub the fence "illegal").

Considerable evidence and argument was devoted to this question. The issue in this arbitration is not whether the Department had authority to erect the temporary fence or whether it has obtained approval for a permanent fence. Rather, as was ruled at the hearing in response to the Department's relevancy objection to evidence about the fence's status, the question of whether the fence is authorized goes solely to whether the Department was acting reasonably when it built and maintained the fence, thereby increasing the risk to employees.

The Union had a document dated April 1998 (UX 1), received from the Employee Relations Officer in the early stages of the grievance (RT 33), in which the Department of Corrections "Capital Outlay Unit" rejected the proposal to build a permanent fence. This report stated that the fence would not prevent inmates escapes, would not prevent inmate access to restricted areas, would restrict perimeter road access and would block fire and emergency access and "create a barricade situation contrary to CDC Security Policy." The Union reasonably relied on this document to conclude that the fence was unauthorized and created a

barricade that was contrary to departmental policy, which supported its contention that the fence unnecessarily subjected Unit 12 employees to a heightened safety risk sufficient to violate Sec. 14.11.

What the Union did not learn until the arbitration hearing itself was that the Capitol Outlay Unit's rejection of SCC's request to make the fence a permanent fixture was not the final departmental action. The Union was not aware that other levels of approval were being pursued since 1998. That effort ultimately led to approval by the Facility Captain in the Security Operations and Maintenance Branch (SX 4). But that letter stating approval of the project was not obtained by SCC's Warden until the day before the arbitration hearing. At the hearing, the Department presented this documentary evidence, and the Warden testified to the facts surrounding its procurement and the justification for seeking a permanent fence (RT 189 et seq.). That evidence showing approval for construction of a permanent fence makes clear that the temporary fence was and is consistent with Department of Corrections' security policy, because it closed off an area that had been vulnerable to security breaches, such as inmate escape or unsupervised visitor access to the prison population, and the potential for passing contraband.

There is no evidence other than the timing of this final approval (dated December 17, 2001) to support the Union's contention that this letter of approval was produced solely to thwart the present grievance, nor to support the Union's suggestion that the approval may not be legitimate. The timing is justified by the Warden's testimony, when he said he sought something in writing specifically for the arbitration when he learned that the Union might argue

that the fence was "illegal." [5] He said he sought written evidence to document his knowledge that the initial 1998 rejection by the Capital Outlay Unit was not the final word, to show that other levels of administration subsequently had approved the temporary fence as a security measure, as had initially been recommended by a security audit, and to confirm that approval for construction of a permanent fence was forthcoming.

As to the "bad faith" claim, the Union presented no evidence that it had made a request, orally or in writing, for information about the fence's status. A Union representative, in February 2001, talked to the Warden about the information he then had that the fence was not approved. He testified that the Warden told him that he did have approval for the temporary fence. Even though that information was contrary to the information in the document that the Union then had, the Union rep testified that he did not ask the Warden for further documentation about the fence, and he said he and the Warden did not specifically discuss the April 1998 document the Union had previously obtained from the ERO (RT 97 et seq.).

This evidence does not support the Union's contention that the Department purposefully "hid the ball" by concealing the subsequent approval of the fence in order to confound the Union's prosecution of the present grievance.

Rather, the evidence supports the Department's contention that erection of the fence was reasonable and that the fence serves legitimate operational concerns. The Warden testified that the temporary fence was initially erected in 1998 in response to a security audit, and he

[5] The Department apparently first became aware of the Union's theory when its DPA attorney noted the caption for the case, in pre-arbitration correspondence, included the tag, "illegal fence." The grievance itself did not include this designation; the focus of the lower levels of processing the grievance was on the level of risk to employees, not on whether the Department had erected an illegal fence, although of course the existence of the fence was central to the grievance from the outset.

explained the security risks which the fence was designed to correct. Although one level of departmental oversight (Capitol Outlay Unit in Planning and Construction) did not agree with that rationale and rejected the application for a permanent fence because of security problems (such as limiting access by fire crews), the Warden explained that other levels of departmental oversight, specifically charged with security issues, disagreed with that initial determination and ultimately approved the fence. (SX 4, RT 199 et seq.) Testimony by a former fire chief of this facility supported the Warden's assertion that the fence added to, rather than decreased, institutional security, even though it interfered with the access routes formerly used by fire apparatus (RT 177 et seq.)

Finally, with regard to the reasonableness of the Department's action, there is no evidence of an alternate route other than the route the employees are now required to take. The Union presented no evidence that it had proposed an alternative other than dismantling the fence that blocks their old access route along the perimeter service road.

Therefore, the increase in safety risk to free staff, caused by increased contact with inmates while crossing the yard, does not constitute a "clear and present danger" because the increase in risk is not significant and the decision to erect the fence was reasonable since it furthers a significant operational concern, namely increasing institutional security by eliminating identified security risks. The Department has provided sufficient protective measures to assure employee safety while traversing the yard. Unit 12 employees are not being required to work where a clear and present danger exists.

AWARD

The Department of Corrections did not violate Sec. 14.11 of the Unit 12 MOU when it required Bargaining Unit 12 employees to traverse Tuolumne Yard to arrive at and depart from their work locations. The grievance is denied.

Date: _____ _____

Bonnie G. Bogue
Arbitrator